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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/527,251

03/09/2005

Jean Taylor

5910-273

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EXAMINER

WOODALL, NICHOLAS W

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

08/19/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	<p>Application No. 10/527,251</p>	<p>Applicant(s) TAYLOR, JEAN</p>	
	<p>Examiner Nicholas Woodall</p>	<p>Art Unit 3733</p>	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 24 July 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: 35.
Claim(s) rejected: 14-21,26-28,33,36 and 37.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Eduardo C. Robert/
Supervisory Patent Examiner, Art Unit 3733

/Nicholas Woodall/
Examiner, Art Unit 3733

Continuation of 11. does NOT place the application in condition for allowance because: the applicant's arguments are not persuasive. The applicant's argument that the Zucherman reference does not disclose lateral transmission elements capable of selectively pressing against the lateral sides of the wedge in a direction transverse to the longitudinal axis is not persuasive. The examiner believes that a top to bottom torque or a bottom to top torque applied to the lateral transmission elements as shown in the examiner's figure to create a concave area of bending at the intersection of the lateral transmission elements and the 1st lateral side or the 2nd lateral side depending on the direction of the torque applied. The bending area would begin to form wrinkles due to the compressive forces acting between the lateral transmission element and the 1st lateral side or the second lateral side. Therefore, the lateral transmission element are capable of pressing against the 1st lateral side or the 2nd lateral side in a direction transverse, i.e. across, the longitudinal axis of the device. The applicant's argument that Zucherman does not disclose first and second compressive lateral elements disposed adjacent to and spaced apart from the lateral sides of the interspinous wedge is not persuasive. First, the examiner believes that the portions of the compressive lateral element attached to the wedge are adjacent the wedge and that the portion of the compressive lateral elements further from the wedge are spaced from the wedge. Therefore, the compressive lateral elements meet the claims limitations of being adjacent to and spaced apart from the wedge of the device. The applicant's argument that Zucherman does not disclose a device wherein the compressive lateral elements are not extending in a longitudinal direction is not persuasive. The examiner would like to note that the compressive lateral elements of the device are capable of being moved without modifying the device. Therefore, one can reposition the compressive lateral element such that they extend away from the wedge in a direction along the longitudinal axis of the device. The applicant's argument that Portney does not disclose a device wherein the lateral transmission elements are configured, i.e. capable of, to selectively press against the lateral sides of the wedge is not persuasive. First, the examiner would like to note the "configured to" limitations is a functional limitation and the structure only needs to be capable of performing the function if one so desired. For example, the examiner believes that if an external compression force was applied to the flat outer surface of the lateral transmission element, the lateral transmission element would press against the lateral side of the wedge element. Therefore, the lateral transmission element is capable of performing the function if one so desired. Second, the lateral compression elements are disclosed as being securely attached to the lateral transmission elements. Therefore, a tension force applied to the lateral compression element would create a torque between the lateral transmission element and the lateral side of the wedge forming at least one area of compression between the lateral side and the lateral transmission element due to the tension applied to the lateral compression element. Therefore, the lateral transmission element is capable of performing the function if one so desired.